

imposition of unjust/unreasonable rates and/or unjustly/unreasonably discriminatory rates. The CPUC, however, has not met, and cannot meet, its heavy burden of proof with respect to these allegations.

When rendering its decision in the 2nd R&O to forbear from enforcing certain aspects of Title II upon cellular carriers, the Commission evaluated the competitive nature of the cellular marketplace and concluded that the cellular marketplace was sufficiently competitive to warrant relaxation of traditional regulatory burdens. 2nd R&O, 9 FCC Rcd. at 1467.

Interested parties, including the CPUC, participated in the FCC's evaluation process by submitting comments with respect to competition in the cellular marketplace. In that proceeding, the CPUC alleged that the cellular marketplace is not competitive because: 1) cellular operators have ownership interests in the competitor within the same market; 2) competitors in one market are partners in another; 3) there is inadequate protection to ensure just, reasonable and non-discriminatory rates; and 4) basic⁵ cellular rates set nine years before had not fallen. 2nd R&O; 9 FCC Rcd. at 1466.

The full Commission considered the CPUC's allegations and proffered several factors which it believed reduced the

⁵ "Basic" cellular rates, as the CPUC utilizes the term, are the rates at which cellular carriers initially offered service. There now exist myriad non-basic rates. See, Section III B (3)(b), infra., for a further discussion.

likelihood of collusion in the cellular marketplace. This Commission then determined that forbearance from certain regulatory requirements was warranted. 2nd R&O, 9 FCC Rcd. at 1467.

Notwithstanding the FCC's prior consideration, the CPUC again raises in its Petition its concerns regarding the competitive nature of the cellular marketplace.⁶ GTE feels compelled to respond to the Petition, since it mischaracterizes GTE's cellular operations within the State of California and reaches erroneous conclusions. In subsections (1) through (7) of this Part, GTE will demonstrate how the CPUC failed to substantiate each of the elements of Section 20.13 of the Commission's Rules.⁷

1. The CPUC Does Not Give an Accurate Assessment of the Wide Array of Competitors in the Wireless Market

Section 20.13 of the Commission's Rules requests that petitioning states provide the Commission with the number of entities providing CMRS within the state, the specific

⁶ GTE feels compelled to express its dismay at the CPUC's continued concern with the allegedly improper cross-ownership of licenses in California markets - especially since, in several instances, the ownership consists of as little as a fraction of a percent of an interest in a particular market. Moreover, the CPUC fails to distinguish between general and limited partnership interests, assuming that a partner without control over or management of a system can exert its will upon the partners with control over the system.

⁷ As the CPUC chose not to raise any allegations of customer dissatisfaction in its Petition, GTE will not address the issue except to indicate that over the last ten years it has been committed to satisfying its subscribers' needs.

types of services which those entities provide, and the number of years for which they have been providing such service. In its Petition, the CPUC provides this Commission with a list of the currently authorized cellular service providers and the amount of time each has provided service in its respective MSA/RSA. Specifically, CPUC states that the State of California is comprised of 18 MSAs and 12 RSAs, served by a total of 40 cellular carriers. See, Petition, p. 8 and Appendix B. In addition, there are 92 radiotelephone utilities with certificates of public convenience and necessity providing service in the state. Petition, p. 11.⁸

Although the CPUC Petition alludes to the presence of paging, SMR, and wide area SMR providers, the CPUC remains silent on the number of such service providers operating within the state, the services which they provide (some of which it admits are substitutable for cellular service) or the amount of time for which these services have been provided.

Despite the CPUC's long held belief that cellular resellers provide competition, the CPUC does not mention the number of certificated resellers offering cellular service within the state. There are currently (as of September 13, 1994) 75 certificated resellers in the State of California. Since resellers provide direct competition to facilities-based

⁸ Eight of the top 20 largest radio common carrier paging operators had systems located in California. RCR Publications, The RCR Top 20 Radio Common Carriers, (December 20, 1993 RCR Publications).

carriers, the CPUC's failure to consider resellers in their analysis skews the CPUC's results.

A review of California's wireless communications marketplace reveals that there are a myriad wireless service providers currently operating there: 40 cellular carriers, 75 resellers, 92 radiotelephone utilities and 1,432 SMR providers.⁹ This is irrefutable evidence that there are a substantial number of competing entities within the State of California, despite the CPUC's claims to the contrary.

The CPUC's regulatory framework has historically provided resellers with a protective shield from competition -- a wholesale/retail margin. See, Sections IV and V, infra. Despite that protective shield, the CPUC believes that resellers have failed to perform as successfully as cellular facilities-based carriers in the marketplace, as evidenced by their declining market share.¹⁰ Petition, pp. 26, 29-30. All the CPUC is describing is that resellers' growth rate is not as great as that of the facilities-based carriers. The CPUC presumes that the cause for resellers' performance is a lack of competition within the marketplace. Id. The CPUC does not describe how resellers are managed, how they are marketing

⁹ The FCC's records indicate that there are 1,432 licensed conventional and trunked 800 MHz SMR service providers within the State of California.

¹⁰ GTE must assume that the CPUC's allegation of a statewide decline in reseller market share is accurate, since the CPUC has redacted all such data from its Petition and the attachments to same.

their service, or what target market they are going after. GTE respectfully submits that resellers have not maintained market share because they have consistently failed to utilize their guaranteed margin to offer customers either unique service packages or reduced rates for service. Instead of utilizing their guaranteed margin to undercut GTE's prices, most of the resellers selling GTE's services mirror GTE's rate plans rather than developing price plans of their own. In other words, an equally plausible explanation is that these resellers are not using the benefits of their guaranteed margins to differentiate their services from those of the facilities-based carrier, and thereby increasing their subscriber base.¹¹ Moreover, the CPUC's contention that resellers are losing market share tells nothing about the degree of competition between facilities-based carriers. A loss of market share is as consistent with competition as it is with the exercise of market power.

2. The Rate of Return Analysis Is Not Credible and Cannot be Used to Substantiate Allegations of Market Power

The FCC has previously rejected the imposition of rate of return regulation in the cellular marketplace. See, Petitions

¹¹ Another reason for resellers' declining market share may relate to actions which the CPUC itself required. In 1992, the CPUC required Pac Tel Mobile Services, the largest reseller in the Bay Area, to sell its customer base, estimated at 80,000, to Bay Area Cellular Telephone Company. This transaction was required by the CPUC's decision in D.92-10-026, barring affiliates of facilities-based resellers from selling off of their own system.

for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies (Notice of Proposed Rule Making and Order), 6 FCC Rcd. 1719, 1724 (1991). Thus, the CPUC's reliance upon rate of return in framing its regulatory structure is misplaced.

Nevertheless, the CPUC asserts that, based upon the "excessive" rates of return earned by cellular carriers, cellular carriers have market power and, therefore, there is a lack of competition in the marketplace. Petition, p. 47. It is questionable whether or not a traditional accounting rate of return is even a proper factor to consider in the cellular industry. The CPUC itself acknowledges that "the cost structure of the cellular industry does not lend itself to uniform measures of expected earnings levels." Petition, p. 57. This, in fact, was a reason for the CPUC's previous rejection of cost-based regulation. Petition, p. 57. However, assuming arguendo that accounting rates of return were appropriate, the CPUC's rate of return analysis is so flawed that the resultant rate of return figures are not credible.

- a. Even if Accounting Rates of Return Were Representative of Market Power, the Selective Use of Such Figures in the Petition Is Misleading

The results of the rate of return calculations are skewed by the omission from the text of results which contradict the Petition's theories. The CPUC only provided examples of entities in the largest (and most profitable) markets earning

the highest rates of return by its calculations - Los Angeles Cellular Telephone Company, Los Angeles SMSA Limited Partnership, Bay Area Cellular Telephone Company and AirTouch Communications. Petition, pp. 48-9. Absent from the text of the Petition is the lower rate of return earned by GTE Mobilnet of California Limited Partnership in a "major" market (most recently at 18 percent, as calculated by the CPUC). Also omitted from discussion were examples of licensees of "medium-size" markets that had rates of return which, according to the CPUC's calculations, ranged from -8.4 percent to 13 percent between 1989 and 1993. Further, "rural" markets, where the average rate of return, as calculated by the CPUC, ranged from -23.6 percent to 14.6 percent between 1990 and 1993, also were excluded from the discussion.

b. Reliance Upon Operating Rates of Return is Misguided, as are the Assumptions Underlying the Calculation of those Rates of Return

The CPUC next examines operating profit, another highly skewed and unrepresentative number. At the outset of its analysis, the CPUC recognized that not all prices which exceed marginal costs are excessive, so long as those operating profits were utilized to increase service availability and enhance capacity within the licensee's service area. Petition, p. 50. Over the last ten years, GTE has invested a substantial sum in its California cellular networks to increase the quality and breadth of cellular service.

Notwithstanding this recognition, the CPUC assumed that cellular operating profits were monopoly profits resulting from carriers' refusal to compete, and were not justified by the strong record of expansion of coverage areas and enhanced capacity which has been achieved over the initial cellular license terms of these carriers. While the CPUC acknowledges that these increases in capacity have been achieved, Petition, pp. 51-4, the CPUC does not give cellular carriers credit for this growth. Instead, the CPUC attempts to wholly discount the substantial investments made in these cellular systems by: first, alleging that the systems are underutilized in certain areas and, therefore, cellular carriers should lower rates in order to increase demand and utilization of currently underutilized cells; and second, that the proliferation of discount rate plans offered by cellular carriers constitutes a realization by those carriers that their systems are underutilized.¹² Petition, p. 54.

i. The Petition's Allegations Regarding Capacity Utilization Are Incorrect

The CPUC's statement that lowering rates will increase demand and, therefore, remedy the alleged system underutilization is incorrect. The relationship among demand, capacity and rates is far more complex and must include

¹² These statements are contradictory. The CPUC first criticizes cellular carriers for continuing to build-out their systems, allegedly oblivious to some perceived underutilization problem, while simultaneously contending that those same carriers employ discounted rate plans to offset recognized underutilization of their systems.

consideration of both the mechanics of a cellular system and the FCC's construction requirements.

First, with respect to the development of a cellular market, it is axiomatic that not all cells of a cellular market will be characterized by equal levels of demand at any given time of the day. Some cells will experience higher demand than others, so the cells which experience higher demand would carry more traffic than cells experiencing lesser demand. To provide a uniform system-wide level of service a cellular licensee must prioritize its efforts so that cells serving higher demand and growing demand first receive cell sectorization or the construction of new cell sites.

The CPUC's observation that certain cells of various cellular systems are less utilized than others is merely a statement of the obvious and not proof that the system is underutilized. The CPUC's suggestion that an overall increase in demand would cause this situation to cease to exist is incorrect - an overall increase in demand would not selectively increase traffic on lesser utilized cells. The CPUC has latched onto a naturally occurring cellular phenomena, varying levels of traffic on cells throughout a system, and attempted to transmute this into evidence that cellular carriers are charging unreasonable rates. Moreover, the CPUC's allegations do not reflect adequate consideration of other factors which drive building the network, such as the mountainous topography of California; the need to continually

upgrade the system in order to provide the most recent technological advancements available; the need to plan for future demand in light of the growth trend of the area; and the promotion of seamless coverage. The Petition also ignores service quality competition in its analysis. It fails to acknowledge the role of capacity in enabling carriers to increase coverage areas, provide better voice quality, and decrease the occurrence of busy channels and dropped calls, all of which allows a cellular carrier to differentiate its service from that of its competitors.

Second, the CPUC's underutilization analysis fails to reflect the fact that both the Communications Act of 1934, as amended, and the FCC's rules require and encourage the build-out of cellular systems. The Communications Act requires common carriers to provide service to all who reasonably request it. 47 U.S.C. §201. A carrier cannot provide service to all potential customers if that carrier has not placed into operation an adequate number of cellular facilities. Similarly, the FCC's rules require that cellular licensees in the first 90 MSAs propose CGSAs which cover 75 percent of the geographic area of the market, and that licensees in the remaining MSAs and RSAs propose CGSAs which cover 75 percent of either the geographic area of, or population of, the market. Until recently, all licensees had to provide service to 75 percent of their proposed CGSAs within three years from the grant of their construction permits regardless of the

demand in those areas. 47 C.F.R. §22.43(c)(1). See, Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, 70 RR 2d 846, 848 (1992). Cellular carriers are also motivated to construct rapidly by the Commission's five year "fill in" policy. After five years from the date of grant of the construction permit, cellular carriers lose the right to fill-in unserved areas within their markets without facing opposing applications. 47 C.F.R. §§22.11(d)(7)(iii); 22.903(d)(3). Thus, the FCC encourages its cellular licensees to rapidly construct market-wide cellular systems and to provide high quality cellular service.

The CPUC should not be permitted to turn on its head cellular carriers' considerable accomplishments. Such an attempt is surprising given that the CPUC has acknowledged the need to build-out cellular systems in order to provide service to all potential customers. See, D.90-06-025. In fact, the CPUC, in that decision, stated that overutilization of a system could be an indication of a lack of competition in the marketplace. Id. The CPUC should not now be permitted to criticize carriers for system development achieved partially in response to FCC and CPUC regulatory policies.

The CPUC, on page 51 of its Petition, transmutes its policy concerning capacity utilization, stating "We concluded that evidence of such improper pricing would be the pricing of

cellular services so high as to discourage full utilization of the system, or failure to invest in system expansion when it is economically justified." Petition, p. 51. In other words, if a cellular carrier does not have full utilization, the CPUC believes prices are too high. If cells are fully utilized, the CPUC believes cellular carriers are not investing enough and that prices are too high, thus restricting demand. The conflicting rationales epitomize a proverbial "no-win situation."

ii. The Cellular Industry's Record is Characterized by Strong Subscriber and Capacity Growth

Contrary to the Petition's contentions, cellular carriers have dramatically increased capacity, in response to consumer demand. On a national basis, the cellular industry has grown from one serving fewer than 100,000 subscribers in December 1984 to one serving over 16 million customers as of December 1993. See, CR Study, p. 5.¹³ This corresponds to an annual growth rate of 77 percent for subscribers. CR Study, p. 6. Between December 1992 and December 1993, the cellular industry experienced a huge surge in subscriber growth, increasing the number of cellular subscribers by almost 50 percent. CR Study, p. 6. Accompanying this increase in service availability are numerous technological advances which largely enhanced the capacity of cellular spectrum, namely: adjusted power input,

¹³ The CR Study cites as the source of this information the Cellular Telecommunications Industry Association End-of-Year Data Survey, 1993.

antenna tilting, dynamic channel assignment via cell splitting and cell sectorization, and the development of digital technologies. CR Study, p. 5.

GTE's California cellular systems have a similarly impressive record. GTEM started operations with 13 cells in 1985 and has increased that number to 241 cells in 1994.¹⁴ Concurrently, GTEM achieved phenomenal coverage area growth, covering in excess of 95 percent of the total area of the San Francisco MSA, and 100 percent of the total area of the San Jose MSA, which are indicative of the coverage provided in many other GTEM California markets.

In addition, the subscriber growth and system development of the California cellular systems of CCI¹⁵ have been similarly strong. The number of cells employed by CCI in these markets grew from 9 in 1988, when CCI was only operating its three MSAs, to 65 in 1994 when all of CCI's systems were operational. CCI's coverage area within each market was greatly expanded by these cell site additions.

¹⁴ Includes the Salinas-Seaside-Monterey, San Francisco, San Jose, Santa Barbara-Santa Maria-Lompoc, Santa Cruz, Santa Rosa-Petaluma and Vallejo-Fairfield-Napa MSAs and California RSA No. 5.

¹⁵ Includes the Bakersfield, Fresno and Visalia MSAs and California RSAs 4, 6, 7, 9 and 12.

- c. The Q-Ratio is Not Indicative of the Level of Competition and Thus Cannot Serve as the Basis for the Conclusion that Rates of Return are the Result of the Exercise of Market Power

The CPUC's reliance on Q-ratio analysis is misplaced. Q-ratios are not indicative, in any way, of the market power held by firms in the marketplace. The Q-ratio is simply the ratio of market value and replacement cost. The market value of a company depends on investors' expectations of future earnings. Replacement value reflects past investments. A business or an entire industry with high growth expectations can have a Q-ratio in excess of one.¹⁶ In a cellular marketplace, regardless of the level of price competition present, the replacement value of the spectrum can never be diminished because the federal government has mandated limited entry into that marketplace. Thus, the fact that the cellular industry is characterized by a high Q-ratio does not contradict or preclude the conclusion that higher than expected rates of return are the result of scarcity of available spectrum and do not constitute monopoly rents. Similarly, scarcity of available spectrum resulting from limited entry does not necessarily preclude the existence of competition.¹⁷ Thus, a Q-ratio analysis is irrelevant to a cellular market power analysis.

¹⁶ Source: Study Prepared by Charles River Associates in Support of the Comments of the Cellular Carriers Association of California filed in this proceeding ("CCAC Study").

¹⁷ Source: CCAC Study.

3. The Petition's Subscriber Rate Trending is Defective and Fails to Provide an Accurate Picture of the California Cellular Market

The CPUC contends that rates for cellular service have not fallen in the nine years since they were originally set. While this may sound dramatic, it is wrong. As will be discussed below, rates have actually fallen in each GTE California system.

- a. GTE's Rates for Cellular Service in California Have Declined. The Utilization of Nominal Rather than Real Rates in the CPUC's Rate Trend Analysis Causes the CPUC to Reach an Incorrect Conclusion.

The first flaw inherent in the CPUC's rate trend review is the utilization of "nominal" rates.¹⁸ The CPUC ignores

¹⁸ One could argue that the first flaw with the CPUC's analysis is its assumption that rates for cellular service should have fallen at all. It is noteworthy that the GAO made the following statement with respect to rate trends in its Report:

... [I]t is not at all clear that the underlying cost structure for the production of cellular service would indicate that prices should have fallen during this time period. In particular, several analysts have suggested that, beyond the initial start-up phase, strong economies of scale do not occur in the production of cellular service because adding customers to the fixed amount of spectrum allocated to each cellular carrier creates congestion and requires expensive cell-splitting to increase effective capacity - particularly in downtown sectors of large cities. Additionally, many cellular systems are still relatively new and expanding service. As a result, many carriers are still incurring large fixed costs. Moreover, large capital costs will continue to be incurred in the future as

the natural phenomenon of inflation - a cost for which every economist would account when evaluating the real change(s) in prices over time.¹⁹ ²⁰ Petition, p. 35, n. 14.

Were the CPUC to evaluate real rates for cellular service, it would have discovered that the trend is, in fact, quite different: real rates for cellular service have fallen dramatically over the past license term.²¹ Such an analysis was conducted by the CR consulting firm. Their findings with respect to rate trends were as follows:

carriers convert from analog to digital technology. Thus, unlike other telephone services (as well as many other products), increased demand may not have resulted in significantly lower per unit costs for producers of cellular service.

United States General Accounting Office Report to the Honorable Harry Reid, United States Senate, GAO/RCED-92-220, Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry, (July 1992) ("GAO Report"), pp. 24-5.

¹⁹ It is important to note that stable nominal prices imply that real prices have decreased. When quality enhancements and increased coverage area are taken into account, subscribers who remained on basic plans over the entire period, 1989-1993, have also clearly benefitted.

²⁰ The CPUC states that it utilized nominal rather than real rates due to its inability to discount current rates for inflation. However, the CPUC was able to provide an inflation rate in order to discount current operating expenses. The CPUC then compares real operating expenses to nominal price changes, producing meaningless conclusions.

²¹ These decreases in price are even more remarkable if one keeps in mind that while prices were falling, GTE was simultaneously significantly increasing the coverage areas of its systems. See, Section III B(2)(b)(ii), supra.

Contributing to the increasing number of subscribers and the accompanying increase in the volume of use has been a steady decline in the costs of owning and using cellular telephones. For example, the real, i.e., inflation-adjusted, unweighted average of the lowest published rate for access and 250 minutes of usage during prime time in the ten largest cellular service areas in 1991 was only 62 percent of its 1983 level.²² Similarly, the average of the lowest real price for the purchase or 150 minutes of airtime in the top 30 markets declined by 27 percent between January 1985 and January 1991.²³

The same general pattern of declining real prices can be observed for cellular systems owned by GTE. The unweighted average of the lowest real prices for systems in the top 100 MSAs in which Contel Cellular Inc. has at least a 90 percent ownership interest declined by more than 20 percent between 1989 and 1993 for 30, 160, and 250 minutes of monthly use.²⁴ For GTE Mobilnet systems, although the unweighted average of the lowest real prices for 30 minutes of monthly use were essentially unchanged between 1989 and 1993, average rates for 160 and 250 minutes declined by 18 and 19 percent, respectively.²⁵

CR Study, pp. 6-7.

In fact, both GTEM and CCI have had substantial real rate reductions in each of their California markets with respect to

²² Data are from Herschel Shosteck Associates, Ltd., Cellular Market Forecasts, Data Flash, September 1992.

²³ General Accounting Office, Concerns About Competition in the Cellular Telephone Service Industry, GAO/RCED-92-220, 1992, p. 22.

²⁴ Calculations assumed 80 percent peak and 20 percent off-peak usage.

²⁵ Collection of the underlying data and computation of the unweighted averages performed by GTE. Inflation adjustments were performed using the CPI.

the "best available plans" at 30, 160 and 250 minutes of use. The price for the best monthly plan offered by GTEM declined since 1989 for all three categories. It declined by approximately 16 percent for 30 minutes of use, 19.3 percent for 160 minutes of use and 19 percent for 250 minutes of use. At 30 minutes of use, the price for the best monthly plan offered by CCI declined approximately 23 percent since 1989 when adjusted for inflation, and the overall price for the best plan for 30, 160 and 250 minutes of use declined 22 percent since 1989. The most significant reductions were seen in the Fresno and Visalia MSAs and in California RSA No. 4, where inflation-adjusted rates dropped more than 26 percent. The rate reductions introduced by both GTEM and CCI are set forth in detail in the bar graphs attached hereto as Attachment B.

In addition to the rates for home area service, GTEM has effectively reduced its rates by increasing its home, i.e. toll-free, service area. Recognizing its customers' need to make long distance calls throughout GTEM's service area, GTEM made the total service area, San Francisco to Santa Barbara, toll free in July 1994.

Moreover, notwithstanding the CPUC's claim to the contrary, Petition, p. 39, CCI and GTEM did lower their rates in response to the CPUC's adoption of the rate-band guidelines. In 1993, CCI reduced the Basic, Security Plan, Executive Plan, VIP Rate and Basic Plus Rate in the Fresno

MSA. (Source: Fresno MSA Limited Partnership, Schedule Cal. P.U.C. No. 2-T.) Subsequently, in 1994, GTEM lowered rates by increasing the included minutes by 100 on two of its top rate plans. These rate reductions are still in effect today. (Source: GTE Mobilnet of California, Limited Partnership, Schedule Cal. P.U.C. No. 6-T; GTE Mobilnet of Santa Barbara Limited Partnership, Schedule Cal. P.U.C. No. 6-T.)

The Petition does not adequately recognize that while real prices for service were declining, cellular carriers simultaneously made advances in technology, improved service quality, increased coverage areas, and introduced enhanced functions and features. GTE has introduced several advances to the cellular marketplace, including Follow-Me-Roaming® and MobiLink,®²⁶ and a call delivery system which uses the latest IS-41 Rev. A technology; several programs to meet the changing needs of its customers including Mr. Rescue Emergency Roadside Assistance, Cellular Assurance Plus Plan and Message Manager; as well as several features such as Call Waiting, Immediate Call Forwarding, No-Answer Transfer/Conditional Call Forwarding, Three-Party Conference Calling, Detail Billing, and Call Restriction.

²⁶ GTE, along with 14 other cellular carriers, played a central role in the development of MobiLink®. The number of member carriers has now expanded to 36.

- b. The Failure to Account for the Vast Proliferation of Discounted Rate Plans When Evaluating Rate Trends Amounts to a Refusal to Consider Irrefuted Evidence Which Is Directly Relevant to the Issue at Hand

Even if one assumes arguendo that consideration of nominal prices is appropriate, the CPUC's rate trending is devoid of merit due to its failure to seriously consider the impact of non-basic rates upon cellular subscribers' monthly costs and its failure to recognize that this is an important form of price competition. It is important at this juncture to clear up a matter of historical significance. The "basic" rate plan was so denominated because it was the first rate plan available, not because it is the rate plan with the most subscribers on it. In fact, over 85 percent of GTE's cellular subscribers are on non-basic rate plans. Despite the suggestion that non-basic rates are onerous, GTE believes that its subscribers utilize non-basic rates not out of masochism but because they enjoy receiving high quality cellular service at a better price for their level of usage.

- i. California Cellular Carriers Did Provide the CPUC with Sufficient Data From Which to Determine How Many Discounted Rates Have Been and Are Currently Offered, the Rates Applicable to Those Plans, and the Percentage of the Subscriber Base Which Takes Service Pursuant to Those Plans

The CPUC pegs its reason not to consider discounted rates on two grounds: 1) cellular carriers did not provide the CPUC with a breakdown of the number of customers on each plan in response to a CPUC inquiry; and 2) that the plans themselves

have so many opportunity costs associated with them that the value of the rate reduction is outweighed and should, therefore, not be counted in a rate trend review. Petition, pp. 34, 36-8. A review of these two rationales reveals that they are devoid of merit.

In its Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications: Order Instituting Investigation, ("OII"), I.93-12-007, the CPUC requested carriers to inform the CPUC of the number of subscribers taking service pursuant to basic and non-basic rate plans. GTE complied with the CPUC's informational request. GTEM and CCI provided data relating to the total number of subscribers on all rate plans, number of units on basic plans, and cellular unit counts by non-basic rate plan²⁷ (which included both reseller and retail contract and non-contract-based plans). (Source: CPUC data submission). Thus, from this submission and through the tariffs on file with the CPUC, the CPUC could determine not only the types of basic and non-basic plans available, but also the monetary benefits which they provide and the number of subscribers to whom those monetary benefits accrue.²⁸

²⁷ CCI did not provide cellular unit count for all non-basic plans, but quantified the number of minutes of use billed to subscribers of such plans, which could be compared to the minutes of use which CCI billed subscribers to its basic plan.

²⁸ The notion that these discounted rate plans are somehow improper should be dispelled by their popularity.

GTE itself has rolled out numerous non-basic plans to more effectively satisfy the varying needs of its customers and to respond to competitive forces within the marketplace, and they have proven to be very popular. The number of rate plans available in CCI's markets has increased more than nine-fold from seven in 1989 to 66 in 1994; GTEM currently offers 38 different retail plans.

Public demand for rate plans has proven so great that today more than 85 percent of GTE's subscribers take service pursuant to non-basic rate plans. The vast number of customers taking service pursuant to discounted rate plans is reflective of the fact that the few conditions associated with those rate plans are far from onerous. After the initial year of service, the contract term automatically converts to a month-to-month contract term. Moreover, although GTE's service offerings are made pursuant to contract, customers always have the option of taking service without a one-year term contract if they do not wish to obligate themselves to one year of cellular service.²⁹ (Source: GTE Mobilnet of California, Limited Partnership, Schedule Cal. P.U.C. No. 6-T; GTE Mobilnet of Santa Barbara Limited Partnership, Schedule Cal. P.U.C. No. 6-T.) Thus, the CPUC's concern that cellular

²⁹ A month-to month service option is available at the same usage rate, but with a slightly higher monthly access charge.

carriers are "locking-up" customers in an attempt to preclude them from switching to other services is unfounded.

Compounding the incorrect nature of the CPUC's review of the effect of contract-based non-basic rates is its failure to accord due weight to the other benefits which those contracts provide. Based upon these contracts, cellular carriers can more effectively predict cellular demand and, consequently, utilize their limited spectrum by more efficiently planning the development of their systems.

c. Not Only Does the CPUC Rely Upon a Misleading Measure of Rate Trends, Misleading Data Is Then Utilized Improperly

i. The CPUC Erroneously Concludes that Similarity of Discrete Rates Within Certain Markets Is Necessarily Due to Collusion and Lack of Competition Within the Marketplace

The CPUC compares carriers' basic nominal rates, and finds that: 1) basic nominal rates in three of the 30 California markets have not changed in five years; and 2) that the basic nominal rates of the competitors are similar in some markets. Based upon these two findings, the CPUC concludes that there is necessarily collusion between the facilities-based cellular carriers, even though it acknowledges that similar prices within the marketplace are just as consistent with a fully competitive marketplace. Petition, pp. 38, 41-3; see also, GAO Report, p. 41 [Uniformity of price "does not necessarily indicate that these markets are noncompetitive."]. GTE wholeheartedly concurs with the CPUC's and GAO's

acknowledgements that similar prices within a marketplace are consistent with a competitive marketplace, and, based on ten years of experience in California, GTE knows that the cellular market in California is competitive.

ii. The CPUC's Comparison of Past Nominal Rate Trends With Investment Made Based Upon Anticipated Future Demand Is Meaningless

The CPUC then compares nominal prices with capital investment per cellular subscriber. Petition, p. 35. This comparison is meaningless, since carriers base their investment not upon the number of existing subscribers but rather on the number of subscribers which the carrier anticipates it must accommodate in the future. Moreover, the comparison reflects the CPUC's failure to recognize a natural economic phenomena: that capital investment per subscriber, or customer, in any business will be greater in the early years of a new industry when the number of customers is smaller than in the later years. The CPUC's analysis confuses the time pattern of investments with unit costs of investment.

4. The Petition's Criterion for Substitutability is Unreasonable and Skews the Results of its Market Power Analysis

a. The CPUC Adopts an Unreasonably Narrow Definition of the Relevant Market

The CPUC predicates its entire market power analysis on a faulty and fundamentally unfair definition of the relevant market. The CPUC believes that the relevant market consists only of cellular service and that other wireless services are

not sufficiently substitutable to be included within that market, either because of their functional capabilities or because of their perceived current unavailability. Petition, p. 24.

By reading traditional market definition criterion so narrowly, the CPUC eliminates from its consideration the competitive impact of various suppliers of substitute services upon cellular carriers. In fact, in one portion of its Petition, the CPUC states: "Currently, there are no substitutes for cellular service in California." Petition, p. 63.³⁰

It is difficult to square this conclusion with the CPUC's previous statements concerning the emergence of competition in the wireless marketplace. In a recent state proceeding, I.93-12-007, the CPUC was cognizant of the "imminent entry of alternative providers of mobile telephone service," and "...envision[ed] that in the not too distant future ... the market forces of competition will police the mobile market..." OII, p. 2. The CPUC continued by stating that "society stands on the verge of yet another series of critical advances as new technologies and new providers come to market," and the "...competitive alternatives to current cellular service may

³⁰ This statement is contradicted by another statement contained in the Petition. The Petition states that carriers are anxious to sign customers to long-term contracts in part to keep them from changing to emerging technologies. Petition, p. 43. If the assessment of this statement is correct, then emerging technologies are already impacting cellular carriers' pricing decisions.